SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SPARTAN'S INDUSTRIES, INC., ET AL., *Appellants*,

v.

THE STATE OF TEXAS, *Appellee*.

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

WILLIAM H. ALLEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

Of Counsel:

WILLIAM H. BLOCH
First Savings Building
at Six Points
Corpus Christi, Texas 78404

GEORGE A. KAMPMANN
612 Milam Building
San Antonio, Texas 78205

OSCAR SPITZ
608 Vaughn Plaza
Corpus Christi, Texas 78401

HAROLD B. BERMAN
JAY S. FICHTNER
1516 LTV Tower
1525 Elm Street
Dallas, Texas 75201

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v.

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On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

Appellants, who are listed in Appendix C to this Statement (p. 26a, *infra*), appeal from a judgment of the Supreme Court of Texas, which sustained against federal constitutional challenge the validity of a state statute under which the Texas authorities seek to prohibit the appellants from engaging in business activities on consecutive Saturdays and Sundays.

OPINION BELOW

The trial court, the 45th District Judicial District Court of Bexar County, Texas, did not write an opinion. The opinion of the Supreme Court of Texas is reported at 447 S.W.2d 407 and is printed in Appendix B to this Statement (pp. 3a-24a, *infra*).

JURISDICTION

This is a proceeding in which the appellants defended against a suit to enjoin conduct of their businesses on consecutive Saturdays and Sundays on the ground that the statute pursuant to which state authorities were proceeding against them was invalid under, among other things, provisions of the United States Constitution. The injunction was denied by the trial court. The Supreme Court of Texas, in a judgment (p. 25a, *infra*) disposing finally of appellants' federal constitutional claims, reversed the trial court and upheld the validity of the statute. The Supreme Court's judgment was entered on November 5, 1969. A timely filed petition for rehearing was denied on December 3, 1969. A notice of appeal to this Court was filed in the Supreme Court of Texas on February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266 (1936); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

STATUTES INVOLVED

Article 286a of the Texas Penal Code, Vernon's Ann. P.C. art. 286a, is set out below. Articles 283, 284, 285, 286 and 287 of the Texas Penal Code are set out in Appendix A to this Statement (pp. 1a-3a, *infra*).

VERNON'S ANNOTATED PENAL CODE OF TEXAS

Art. 286a. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Ses. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding

six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

QUESTIONS PRESENTED

1. Whether a state statute that lists categories of articles and goods and prohibits their sale on both of the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it bears no rational

relationship to the legitimate legislative purpose of so-called Sunday closing laws, *i.e.*, to provide for a common day of rest and tranquillity.

2. Whether such a statute denies to merchants to whom it applies the equal protection of the laws because it subjects their businesses to rules and sanctions different from those applicable to other businesses and there is no rational basis for the classification in view of the purpose and effect of the statute establishing it.

3. Whether a criminal statute that lists, without definition, nearly 50 categories of articles and goods, a number of them not self-defining, and forbids their sale on the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it is so vague as not to give them fair warning of what conduct on their part is proscribed.

STATEMENT

A Texas statute makes it unlawful to sell 46 named categories of articles and goods on both of the two consecutive days of Saturday and Sunday. The items listed may be described roughly as those that are sold in department stores. The terms used in the list are not defined by the statute, and not all such terms are self-defining. They overlap with one another, and they range from such specifics as "television sets" to generalities like "home appliances" and "hardware." This Texas statute, enacted in 1961 as Article 286a of the Penal Code, was obviously motivated by the same animus toward the seven-day operation of discount department stores that lay behind the 1959

Pennsylvania statute that this Court considered in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 590-91 (1961).

Violation of the statute is a misdemeanor, carrying a penalty of a $100 fine for the first offense and a jail term of six months or a $500 fine or both for a subsequent offense. Section 4 of the statute makes "the operation of any business . . . contrary to the provisions of" the Act a public nuisance and authorizes injunction proceedings to restrain any violation of the statute.

Texas' existing Sunday closing laws, Articles 286 and 287 of the Penal Code, were not repealed when Article 286a was enacted. Article 286 is a general Sunday closing law, applying to merchants, grocers, dealers and traders and proprietors of places of public amusement and carrying a fine of $20 to $50. Article 287 excepts certain kinds of goods and establishments from Article 286. Section 5a of Article 286a provides that Articles 286 and 287 do not apply to sales of items listed in Article 286a. Only Article 286a is enforceable by injunction.

In this case a district attorney invoked the injunctive provisions of Article 286a against these appellants, four discount stores in San Antonio and some of their employees, asking that they be enjoined from selling merchandise in violation of the statute. (Tr. 1-9).[1] When the suit was filed the trial court granted a temporary restraining order and fixed a date for a hearing on a temporary injunction. (Tr. 10-11). The parties elected to be heard instead on certain pleas entered by the defendants that, if decided favorably

[1] "Tr." citations are to the transcript of record in the trial court, which constituted the record in the Texas Supreme Court and is Document 1 in the record filed in this Court.

to them, would finally dispose of the case without the necessity for a hearing on the preliminary injunction. Among other things, the defendant stores and their employees pleaded that on several counts the statute was unconstitutional as in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. (Tr. 13, 15-23, 40). The trial court sustained the constitutional challenge and on that basis denied the injunctive relief the district attorney had sought. (Tr. 60-61).

On appeal the Texas Supreme Court, with its Chief Justice and two associate justices dissenting, reversed the trial court, sustaining the constitutionality of the statute. (P. 3a, *infra*). It finally and expressly disposed of the appellants' federal constitutional claims but remanded for determination of non-federal issues. Compare *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n. 4 (1964). The dissenting justices would have held the statute unconstitutional. (P. 14a, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court's decisions in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and the companion cases—now nearly a decade old—have not stilled judicial controversy over the Sunday closing laws or blue laws of the states. The volume of litigation concerning the validity and application of particular blue laws may not even have diminished since *McGowan* was decided.

The questions that surround Sunday laws are by no means trivial. The 222 pages of opinions on the subject that this Court handed down in the 1960 Term attest to that. The constitutional questions raised in this case, relating to a kind of statute not considered

in *McGowan* and its companions, are substantial enough to have divided justices of the highest courts of several states. They deserve the plenary consideration of this Court.

We offer the following background to put the questions in perspective.

Frequently complex, vague and uncertain in their application, and not especially popular, Sunday laws invite nonenforcement, selective enforcement and litigation.[2] The situation in Texas is illustrative. Since

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[2] A respected national newspaper recently carried a long story headlined, "Seven-Day Operation Upsets Some Retailers, But Customers Like It." The story describes extensive Sunday shopping in a state with a Sunday closing law containing only the customary exemption for necessities. Wall Street Journal, Dec. 10, 1969, p. 1, col. 1. The Associated Press quotes an Ohio district attorney as saying, "Nobody enforces the law, I guess because it's an unpopular one," and describes large-scale Sunday selling operations in a number of states. San Antonio News, Jan. 15, 1970, p. 1-B. The Virginia Supreme Court of Appeals noted testimony before legislative committees to the effect that Virginia's Sunday law as it existed prior to 1960 "was being extensively violated and it had become practically unenforceable because its language was too general and the language of the exception prescribed for 'works of necessity or charity' contained therein was uncertain and confusing to law enforcement officers, juries and the general public." Mandell v. Haddon, 202 Va. 979, 984-85, 121 S.E.2d 516, 521 (1961). "Enforcement of the [Sunday] statute by criminal process has been spotty and sporadic," and "large numbers of people openly flout them [blue laws] with impunity." Arlan's Dep't Store v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963). See also State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 764-65 (N.D. 1966).

An index to the volume of Sunday law litigation before this Court decided McGowan v. Maryland, 366 U.S. 420 (1961), is provided by the reported cases cited in Mr. Justice Frankfurter's separate opinion, especially *id.* at 496 n.78, 497 n.82, 508 nn.97 & 98, 509 n.99, 522 n.120, 527 n.128, 528 n.129, 531 n.133, 532 nn. 134 & 135. A number of the reported cases since *McGowan* are cited in this Statement.

1863 Texas has had a criminal statute, now Article 283 of the Penal Code, prohibiting Sunday labor. Article 286, prohibiting the opening of businesses on Sunday, has been on the books since 1871. Each statute has its exceptions, which differ in their scope; sabbatarians, for example, are exempted from the Sunday labor prohibition, Article 284, but not from the Sunday closing law, see Article 287. (For the texts of these statutes, see pages 1a-3a, *infra*). Because of the statutory exemptions and factors that are conducive to nonenforcement—the uncertainty of the statutes, the fairly nominal fines that are the only penalties for violations and the attitudes of the public and of enforcement officers—these statutes have scant effect upon the lives of Texans. Drug stores, food stores and gasoline service stations operate on Sunday freely and openly. So do industrial plants. The court below said that the sanction of Article 286, a maximum fine of $50 (Article 283 carries the same maximum), "is not effective for the considerations of large businesses and busy prosecutors." (P. 8a, *infra*).

The only law with any bite is the statute in issue here, Article 286a, which was superimposed upon the Sunday closing law and its exemptions in 1961 and which is enforced, principally by way of injunction suits, in some but not all Texas counties against stores that would sell the categories of articles and goods named in the statute on consecutive Saturdays and Sundays.

Among the statutes that this Court considered in 1961, Article 286a most nearly resembles the 1959 Pennsylvania statute, also aimed at discount department stores, that was involved in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961), and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). The Penn-

sylvania statute also listed categories of goods, but it prohibited their sale on Sunday and thus, in this Court's view, in effect merely added special sanctions for Sunday sales of the specified articles to the general long-standing prohibition of Sunday sales.

The Texas statute is very different. In allowing sales on either Saturday or Sunday (and, indeed, not requiring any stores to be closed on either day) the Texas statute departs altogether from the justification that this Court and other courts have found for the extraordinary inhibitions upon otherwise legitimate business activities that the blue laws impose, the setting aside of Sunday as a common day of rest. Substantial questions are thereby raised whether the statute, lacking any relationship to a proper legislative purpose, deprives the merchants subject to it of liberty or property without due process of law and denies them the equal protection of the laws. Moreover, the list of articles and goods set forth in Article 286a, a criminal statute, raises another substantial question that is not concluded by the 1961 cases, *i.e.*, whether the list includes terms so vague and uncertain as not to give the fair warning of proscribed conduct that due process requires.

I

The original purpose of Sunday laws was to ensure that the orthodox Christian sabbath was not profaned.[3] They have evolved, according to this Court (and state courts), into civil regulations that do not offend the establishment clause of the First Amendment or com-

[3] Texas' Sunday Laws, so described in the chapter heading, constitute Chapter Two of Title 7 of The Penal Code. Title 7 is entitled "Religion and Education."

parable provisions of state constitutions. See *McGowan* v. *Maryland*, 366 U.S. 420, 429-53 (1961); *id.* at 508 n.98 (state cases). The justification uniformly given for the Sunday laws as non-religiously motivated infringements upon the customary right of a merchant to open his place of business and sell what he wishes when he wishes has been that a legislature may prescribe for the inhabitants of a state a common day of rest. The Court put it this way in the *McGowan* case, in explaining that state legislatures had more in view in enacting Sunday laws than merely ensuring one day's rest in seven:

> "[T]he State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days." *Id.* at 450.

In *Sherbert* v. *Verner*, 374 U.S. 398, 408 (1963), the Court described the decision in *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), one of the companions to the *McGowan* case, where a statute was upheld against a claim that it interfered with the free exercise of religion, as resting on "a strong state interest in providing one uniform day of rest for all workers."

Appellate tribunals of a number of states likewise have found the justification for the infringement on liberty and property that blue laws involve in the desire to set aside a common day of rest.

> "Since the statute, enacted under the police power of the State, serves a strong state interest in pro-

> viding one uniform day of rest for its citizens, it does not violate the Constitutional provisions respecting the establishment of religion or the free exercise thereof." *State* v. *Solomon*, 245 S.C. 550, 568, 141 S.E.2d 818, 828 (1965).

And the Wyoming Supreme Court, after citing this Court's 1960 Term opinions, said that Sunday statutes "are . . . countenanced as having for their purpose the general welfare of the people by providing a day devoted to rest, repose, recreation, tranquility, and family togetherness . . . ." *Nation* v. *Giant Drug Co.*, 396 P.2d 431, 434 (Wyo. 1964). See also these recent cases: *Courtesy Motor Sales, Inc* v. *Ward*, 24 Ill. 2d 82, 84-85, 179 N.E. 2d 692, 693 (1962); *State* v. *Target Stores, Inc.*, 279 Minn. 447, 456-57, 156 N.W. 2d 908, 915 (1968); *GEM Stores, Inc.* v. *O'Brien*, 374 S.W. 2d 109, 116-17 (Mo. 1963); *Terry Carpenter, Inc.* v. *Wood*, 177 Neb. 515, 521-23, 129 N.W. 2d 475, 479 (1964); *Charles Store Co.* v. *Tucker*, 263 N.C. 710, 715-16, 140 S.E. 2d 370, 374 (1965); *Mandell* v. *Haddon*, 202 Va. 979, 989-91, 121 S.E. 2d 516, 524, 525 (1961); *State ex rel. Black's, Inc.* v. *Gates*, 149 W. Va. 421, 437-39, 141 S.E. 2d 369, 381-82 (1965).

Article 286a of the Texas Penal Code does not fit within the common-day-of-rest justification. It permits Sunday sales—sales that, according to the law on the books at least, were illegal before Article 286a was enacted. It is small wonder, then, that when Article 286a and statutes like it have been challenged, some judges of state courts of last resort have been unable to conclude that they bear the constitutionally necessary reasonable relationship to some legitimate legislative purpose. The Chief Justice and his two colleagues who dissented from the decision below found it

"difficult to see" how the common day of rest "argument can now be used to support and sustain a Sunday opening law which is calculated to result in some members of families working on Saturday and resting on Sunday while other members rest on Saturday and work on Sunday." (Pp. 21a-22a, *infra*). Concerning a similar Michigan statute, an opinion joined by three justices of the Michigan Supreme Court said that its

> "sole and only objective . . . is to eliminate, or at least reduce, competition, since the general welfare is neither enhanced nor promoted, and since no evil is eliminated by the Act, it must be concluded that it is not a valid and proper exercise by the legislature of its police power." *Arlan's Dep't Stores, Inc.* v. *Kelley*, 374 Mich. 70, 75, 130 N.W.2d 892, 894 (1964).

In the same vein, the dissenters below said that "the proscriptions of Art. 286a have no reasonable relationship to the health, recreation or welfare of the people . . . ," and therefore the statute "is an arbitrary exercise of the police power. . . ." (P. 24a, *infra*).

This Court said in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962), "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests," and it quoted from *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), "the classic statement of the rule," which is that

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Here, we submit, the interests of the public do not require the interference with these appellants' businesses that Article 286a works; the means chosen are not reasonably necessary to serve any legitimate interests of the public, and the appellants are unduly oppressed, not in the interests of the public but solely in the interest of competitors who do not enjoy all the rigors of competition. To say that in these circumstances the Texas statute is invalid under the due process clause is not to ignore opinions of this Court such as those in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). It is simply to recognize that there comes a point at which legislation, even legislation dealing with economic affairs, becomes, for want of relationship to any legitimate public purpose, arbitrary, nothing more than harassment of those subject to it. *Cf. McGowan* v. *Maryland*, 366 U.S. 420, 542-43 (1961) (opinion of Frankfurter, J.) The question whether Article 286a is such an arbitrary statute is a substantial one.

The question is particularly substantial in the case of Article 286a because not only does that statute fail the common-day-of-rest rationale, but it does not even have any necessary tendency to promote "a one-day-in-seven work stoppage," *McGowan* v. *Maryland*, *supra* at 450, or, as the court below put it, a "one day a week surcease from commerce" (p. 9a, *infra*). It commands the closing of no business either on Saturday or Sunday but merely prohibits the sale of specified articles and goods on both of those days. Drug stores and food stores, for example, which sell many of the articles listed in Article 286a, are legally open on consecutive Saturdays and Sundays. There have been

cases in which other kinds of stores have stayed open on both Saturday and Sunday, with certain sections roped off on one day or the other. *Hill* v. *Gibson Discount Center,* 437 S.W. 2d 289, 290 (Tex. Civ. 1968). Article 286, the general Sunday closing law, does not apply in such circumstances to prohibit the opening of the store on Sunday. *Ex parte Wilson,* 374 S.W. 2d 229 (Tex. Civ. 1964). Compare *County of Spokane* v. *Valu-Mart, Inc.,* 69 Wash. 2d 712, 419 P.2d 993 (1966), in which it was held that a municipal ordinance barring the sale of named commodities on Sunday was void as an invalid exercise of the police power, in major part because affected stores could remain open and the legislative purpose of securing a common day of rest (or even a day of rest a week) was not served.

II.

Article 286a of the Texas Penal Code singles out named items and some of the merchants who sell them for special adverse treatment. Other merchants are subject only to the unenforced Articles 283 and 286 or are within the exemptions from those articles. Drug stores and food stores are among those exempted and, as the dissent below pointed out, it is

> "a matter of common knowledge . . . that drug stores and grocery stores, which are legally open on the consecutive days of Saturday and Sunday, sell and offer for sale a large number of the listed items on both days. . . ." (P. 19a, *infra*).

Thus, Article 286a effects a discrimination. The discrimination is such as to deny to merchants subject to Article 286a the equal protection of the laws. This is clear under what the Court only a few weeks ago de-

scribed as "the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Turner* v. *Fouche*, No. 23, O.T. 1969, decided Jan. 19, 1970, slip op. p. 15.

If this test is applied, it is immaterial that for some purposes the goods typically sold in discount department stores can be classified separately from other goods or from the same goods sold by others. The question is whether in the context of the particular statute in issue the classification is rationally related to a proper state purpose. "[A] statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957). For example, a state can undoubtedly treat an alien differently from a citizen in some respects, see *Clarke* v. *Deckebach*, 274 U.S. 392 (1927), but it may not use the alien/citizen classification to restrict severely the economic opportunities of aliens because "the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction . . . does not go so far . . . ." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

Thus, when the Court held in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589-92 (1961), that Pennsylvania's 1959 Sunday law reasonably classified for special Sunday treatment a number of the same kinds of articles that are mentioned in Article 286a, it by no means concluded the equal protection claim made here. The Court, as we have said (pp. 9-10, *supra*), saw in the 1959 statute merely a supplement to Pennsylvania's existing Sunday laws

and thought it rational for the legislature to impose heavier penalties for the sale of the listed goods because it might reasonably be thought that the stores that sold them "were particularly disrupting the intended atmosphere of the day." Here there is no such possible rationale or justification for the legislature's action. The reasons have been detailed in the preceding section of this Statement: the statute, which allows stores to open and goods to be sold on Sunday, is not necessarily conducive to any Sunday atmosphere of rest. In short, the considerations that we have urged make the statute violative of due process also make it a denial of equal protection since the device of classification has been used by the legislature. Two state courts of last resort have held that statutes similar to Article 286a in listing items that cannot be sold deny the equal protection of the laws. *Hughes* v. *Reynolds*, 223 Ga. 727, 157 S.E. 2d 746 (1967); *Terry Carpenter, Inc.* v. *Wood*, 177 Neb. 515, 129 N.W. 2d 475 (1964). Compare *Skag-Way Dep't Store, Inc.* v. *City of Omaha*, 179 Neb. 707, 140 N.W. 2d 28 (1966) (city ordinance naming items forbidden to be sold on Sunday invalid for lack of reasonable classification); *County of Spokane* v. *Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966) (similar county ordinance invalid on same ground, among others). See also, *e.g.*; *Courtesy Motor Sales, Inc.* v. *Ward*, 24 Ill. 2d 82, 179 N.E. 2d 692 (1962). At the very least the question is substantial.

III

If a person of common intelligence who is subject to a criminal statute must guess just what conduct it is that the statute makes criminal, the statute is unconstitutional because it does not give the fair warning

that due process of law requires. The numerous void-for-vagueness cases decided by this Court all go to establish that proposition. *E.g.*, *Musser* v. *Utah*, 333 U.S. 95 (1948); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926). Article 286a, listing articles and goods without defining the terms used in the list, is unconstitutionally vague by the established standard.

In the *McGowan* case the Court held that the Maryland statute there at issue, forbidding Sunday sales generally with certain exemptions, was not so vague as to be void. 366 U.S. at 428. The Maryland statute, however, is quite different from Texas' statute. This Court has not considered the validity under this head of due process of a statute like Article 286a. The issue of vagueness was not raised in *Two Guys* or *Braunfeld* v. *Brown* with respect to the 1959 Pennsylvania statute.

In *McGowan* the Court concluded that, among other things, "ordinary commercial knowledge" would tell businessmen what was encompassed by the Maryland Sunday statute and its exceptions. That is not true of Article 286a. "Hardware" is an example of the more troublesome of the terms used in Article 286a. Does that term include automotive parts, fish hooks, razors, shot gun shells, garden hose, sandpaper, paint and water pumps? There are other terms of similar generality whose scope a merchant is left to guess at. Are scarves, bandanas, hair nets and mantillas included in "headwear"? "China" is on the proscribed list. What of pottery, plastic or tin dishes? "Recordings" are listed. Does that include tape recordings? Are portable outdoor barbecue grills within the statute as "home appliances" or "stoves" or "outdoor furni-

ture?"[4] Examples of the uncertainties could be multiplied.

The list of items in Article 286a is very much like a somewhat shorter list in a Minnesota statute. That statute was held unconstitutionally vague in *State* v. *Target Stores, Inc.*, 279 Minn. 447, 156 N.W. 2d 908 (1968). The court there, having set out three examples of ambiguity among several suggested by the parties, said that although it believed

> "that a responsible department store official would be able to determine the classification of many, probably most, commodities, we have been disabused of the belief that there are not numerous other commodities which cannot with certainty be so classified." *Id.* at 470, 156 N.W.2d at 923.

Similarly, two justices of the Michigan Supreme Court would have held a Michigan department-store-list statute very much in the pattern of Article 286a unconstitutionally vague. *Arlan's Dep't Stores, Inc.* v. *Kelley*, 374 Mich. 70, 80-82, 130 N.W. 2d 892, 897 (1964).

The question presented, whether Article 286a, which forbids activities that are not harmful in themselves, describes those activities with enough certainty to meet the standards of the due process clause, is substantial.

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[4] The example is adapted from State v. Target Stores, Inc., 279 Minn. 447, 468-69, 156 N.W.2d 908, 922 (1968), holding a similar Minnesota statute void for vagueness. The case suggests another example: The Minnesota statute names "phonographs and recorders," and the court thought it uncertain whether replacement phonograph needles or hi-fi components were included. Article 286a does not name phonographs (although it does name musical instruments and recordings), and it is not clear whether phonographs (or tape recorders) are to be considered home appliances. It is true that radio and television sets are specifically named, but so are such undoubted home appliances as refrigerators, washing machines and driers.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary hearing on the merits.

Respectfully submitted,

WILLIAM H. ALLEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

Of Counsel:

WILLIAM H. BLOCH
First Savings Building
at Six Points
Corpus Christi, Texas 78404

GEORGE A. KAMPMANN
612 Milam Building
San Antonio, Texas 78205

OSCAR SPITZ
608 Vaughn Plaza
Corpus Christi, Texas 78401

HAROLD B. BERMAN
JAY S. FICHTNER
1516 LTV Tower
1525 Elm Street
Dallas, Texas 75201

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